IN THE

Supreme Court of the United States.

Nos. 49 and 58. October Term, 1902.

KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY,

KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY,

In Error to the Supreme Court of the State of California.

Petition for Rehearing.

Now comes the plaintiff in error, Kennedy Mining and Milling Company, and respectfully petitions this Honorable Court for a rehearing of the above entitled cause, for the following reasons:

In the case there was involved in its inception a federal and a non-federal question. The first whether upon a correct construction of the laws of Congress under which both parties claimed title, the ores in question passed by the Pioneer patent or

by the Silva patent. The second whether the plaintiff in error is estopped from claiming that the title to the ores passed by the Silva patent.

The opinion, as we read it, affirms that the first presents a federal question conferring jurisdiction. This assumption of jurisdiction involves the conclusion that the State Court did not base its judgment on the estoppel, but did base it on the law raising the federal question.

Johnson v. Risk, 137 U. S., 309.
Eustis v. Balles, 150 U. S., 367.

The record necessitates the same conclusion, inasmuch as the facts upon which the estoppel was based were excluded on objections to them as evidence. The objections were to all and singular, each and every the facts stated in paragraph 7 and paragraph 8 of agreed statement (Printed Trans., p. 41, f. 82). Among the grounds of objection were that the agreement as to common boundary line is neither recited nor referred to in the Kennedy patent, nor recorded in the office of County Recorder of County where the mine is situated, nor is it alleged that plaintiff in error was a party to said agreement or had notice or knowledge of it, either when it acquired title to the Kennedy, or when it acquired title to the Silva (Trans., p. 42, f. 83).

The facts *so ruled out* and excluded from the case, are set forth in paragraphs VII and VIII of said statement (Trans., pp. 14-15, ff. 32-33).

The ruling out of these facts was a decision against the estoppel, for thenceforth everything tending to show any surface conflict between the old Kennedy and Pioneer Companies, every proceeding taken thereupon and every agreement between the companies was expunged and the Court could hereafter take no notice of them and make no decision based upon them. They stood by the very terms of the agreed statement as if they had never been inserted in it or in any way brought to the knowledge of the Court. It was not, properly speaking, an agreed statement of fact, but was, and was carefully expressed to be, merely a waiver of or dispensing with formal proof of facts, subject to the ruling of the Court on their competency. (Trans., pp. 12-13, ff. 28-29.)

By the same express provision, the ruling which excluded this evidence must "be deemed and taken as duly" excepted to by

the defendant in error, and if the ruling was erroneous, the only possible correction was a reversal and a new trial upon which the plaintiff in error would have the right to avoid the effect of the admission of the evidence by any showing consistent with its truth. The Supreme Court of California by its constitution and the Constitution of the State and according to its settled practice could itself make no *finding* of the facts alleged to constitute the estoppel. Kellogg v. King, 114 Cal., p. 389. The only *finding* made by the ~~Supreme~~ Court was its ruling adopting portions of the so-called agreed statement and rejecting and striking out the remainder.

The opinion of the Supreme Court of California shows acceptance of the ruling out of this evidence, and that the judgment was based solely on the law raising the federal question.

Assuming, as we may, for the purposes of this petition, that the federal question was erroneously decided below, we have a case involving two questions, one federal and one not, the former decided erroneously against the plaintiff in error, the other decided against the defendant in error. In such case, we submit, the judgment cannot be affirmed. As said in the Murdoch case, 20 Wall., 635, any examination "into the points in the record other than the Federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain *if any such have been decided*, and their sufficiency to maintain the final judgment, *as decided by the State Court.*"

A judgment unsustainable on the Federal question, may be sustained by a decision, correct or incorrect, of a non-Federal question actually made by the State Court; but not by the existence of a non-Federal question undecided by the State Court; and *a fortiori*, not by the existence of such a question actually decided by the State Court in favor of the plaintiff in error.

It follows from Eustis v. Bolles and other cases, that this writ of error was not dismissed, but jurisdiction was taken, *because* it affirmatively appeared from the record that the judgment below was rested upon the Federal question; but even if it had appeared that the Court below decided the independent question in favor of the defendant in error (that is, that the objection to the evidence of estoppel was overruled), and not on the law raising the Federal question, this Court would not have assumed jurisdiction of the case, even though it considered the ground of estoppel not good or valid. By strict parity of reason, when the record, as here, affirmatively shows that the State Court

decided the independent ground, to wit, the estoppel, in favor of the plaintiff in error, by rejecting the evidence offered to sustain the estoppel, thus precluding any possible presumption that the judgment was based on the non-Federal question, all reason for a consideration here of the correctness of the ruling on the independent ground ceases. In such case, as said in the Murdoch case, there is no possibility of injustice being done by reversing a judgment which must in the end be reaffirmed by this Court, which on another appeal would simply confine itself to the Federal question, leaving the determination of those involving only consideration of local State law and policy, such as the estoppel, to the final arbitrament of the State Court, which by conclusive presumption here must adhere to its former ruling already in that Court made the law of the case by its practice and rules, and certainly made final and ended by the action of this Court after assuming jurisdiction on this writ.

Even if the examination in this Court is not, as we understand its careful enunciations (see 20 Wall., 635), limited to the ascertainment whether points other than Federal were decided and their sufficiency (that is, the sufficiency of those decided in favor of defendant in error) to maintain the judgment, and may be made for the purpose of determining whether they were correctly or erroneously decided, we earnestly request a reconsideration of the question whether on this record, the ruling excluding the evidence of estoppel was not clearly correct for the reasons assigned in the specific objections to the testimony.

If we are correct in any of our contentions as to the Federal questions—if independently of any question of estoppel or agreement, the Argonaut had no extralateral rights, then the ores in controversy were at the time of the location of the Silva the property of the United States, part of the public mineral domain and subject to location and appropriation under the laws of Congress. This is not only, we submit, self evident, but practically most important, as the ruling here must apply to all mining patents with flaring lines heretofore issued or hereafter to be issued. By it does not this Court authoritatively announce that such locations, however violative of the letter and spirit of law, however destructive of its just limitations as to quantity, may be held good against all subsequent locators, because made in pursuance of some agreement between adjoining locators to disregard the law, thus held binding and enforcible not only as between and against the conspiring or agreeing parties to the

agreement, but against all third parties, without proof or evidence of notice of the agreement, actual or constructive. Surely the Eureka case cited in the opinion does not justify such a novel extension of the doctrine of covenants running with the land.

In the Eureka case the agreement was explicit and between the same parties, and in addition to the agreement there were binding deeds and covenants and warranties. Here the plaintiff in error was neither party nor (so far, at least, as and to the full extent that, it claimed under the Silva) privy; and one of the sustained grounds of objection to the evidence was that it had no notice actual or constructive. The record shows that the ground was well taken. The agreement was not recorded, nor is there anything in the Kennedy patent to put a purchaser from the patentee on notice of the contest or of the agreement. Although the specific objections to the evidence apprised the defendant in error of this, not a scintilla of evidence was proffered to obviate them. We cannot conceive how or on what principle this ruling on evidence could have been other than it was. The plaintiff in error was a purchaser of the Kennedy ground, it is true. But it is shown to have had no other relationship to the patentee thereof. There was nothing in the chain of title to even put it on inquiry. It made no agreement or covenant whatever with the defendant in error or its grantor. It knew nothing of the agreement or the contest except what appeared on the face of the Kennedy patent and that was nothing. Can it be that every purchaser of patented mining ground, by the mere act of purchase becomes affected by all unrecorded agreements between his grantor and the patentee of neighboring or even adjoining and coterminous mining claims? Does the fact of such purchase imply an obligation to respect the claims of adjoiners and estop the purchaser from acquiring adverse titles to them? There was no relationship whatever, certainly no fiduciary one, between the plaintiff in error and the defendant in error or its grantee to prevent the former from standing at arms length to the latter. In every purchase of a patented mine, the purchaser may be said to have notice of the facts in his own chain of title. He cannot be held to constructive notice even of the fact of adjoining locations, much less of their boundaries, and whether they are coincident with some of his. Even if the plaintiff in error were affected with constructive notice that the Pioneer patent had a common end line with the Kennedy, how can such notice merely work any

estoppel or bring into play the doctrine of the Eureka case or estop it from locating unappropriated ground subject to location under the law? It does not follow from the fact of the coincidence of two patented end lines, that such coincidence was the result of any agreement between any of the locators or patentees, nor does it even suggest any such agreement, much less any contest or compromise. If there had existed any other defect in the Pioneer title, or any other paramount claim, such as a tax title or a trust or a lien, etc., would anyone say plaintiff in error was estopped from purchasing the adverse title and asserting it? If not, why is it estopped by the mere knowledge, had such existed, of the coincidence of the end lines, from acquiring the true title which was in the Government? We respectfully submit that every element of estoppel, is wanting. It does not even appear that the plaintiff in error located the Silva. It may have been located by some third party and sold to the plaintiff in error. On the defendant in error was the onus of proving the estoppel, and in the absence of any showing on this point we have the right to assume that such was the fact. If so the title to the ores in question undoubtedly passed by the location to the locator. Of this the Silva patent is conclusive. That locator had the right to pass the title to any one. If the plaintiff in error had made a warranty deed to this defendant in error, then such an after acquired title would pass to it. If as in the Eureka case, it had covenanted for a consideration as there said, not to claim or exercise any right beyond a compromise line, an estoppel might arise. But will this Court say such a title could be affected by the mere constructive knowledge that one of the end lines between the Kennedy and Pioneer happened to be coincident or identical?

In that portion of the brief of the defendant in error which the Court has in part adopted and followed, it is said (p. 7) "It is but fair to state that the trial Court *declined to consider the agreement as a factor in the case and sustained the objection of plaintiff in error thereto.*" And (pp. 62-63) "whether or not we may consider the agreement * * * as valid and binding on the successors in interest of the two original companies who were parties to it, certainly the present Kennedy Company purchased with the knowledge that there was a common boundary established as such by the parties * * * of one thing we are quite sure the common boundary * * * was fixed as the

result of an adverse proceeding in the land office, and the agreement entered into in respect thereto."

But how can this Court be sure or know that the boundary was fixed as the result of the adverse proceeding or the agreement. By the very concession of the brief these facts were excluded and are not in the case.

Then the brief cites a California case, McGee v. Stone. But obviously all that case holds is that *in so far as the purchasing parties rely on the title purchased* they may be bound by the acts of their grantor. The case could only be in point or applicable, if no location of the Silva had been made, and the plaintiff in error as the grantee of the old Kennedy Company and solely by reason of its purchase and ownership of that title, had sought to attack the validity of the compromise line and agreement. On the ground, for example, as was the case in McGee v. Stone, that the agreement had been made by mistake. Irrespective of the contest and agreement, the only value or pertinence of notice of the fact of the common boundary line, arising as it does from the fact of purchase, must be limited and confined to the assertion of the rights purchased. The act of purchasing and the knowledge concerning the thing purchased cannot be tortured or twisted into an agreement not to purchase something else in no way affected by the thing of which knowledge is so imputed. You might as well say that an heir by inheriting was liable for the debts of the ancestor not only to the extent of the assets, but was estopped from denying the validity of such debts when sought to be enforced out of his own property.

The opinion of this Court says (italics here and elsewhere ours) "The common boundary A. B. crossing the lode *was fixed as the result of an adverse proceeding in the land office, and the agreement entered into with respect thereof was as set forth in the agreed statement of facts.*"

With respect to this statement so made a ground of affirming, we beg leave earnestly to repeat, that the State Court having decided in favor of plaintiff in error upon the questions involved and embraced in the matters set out in paragraphs VII and VIII of the statement of facts, relative to said agreement and estoppel, its action is conclusive upon this court.

In Murdoch v. City of Memphis, 20 Wall., 635, this Court has said: "We have already laid down the rule that we are not authorized to examine these other questions for the purpose of deciding whether the State Court ruled correctly on them or not.

We are of opinion that on these subjects not embraced in the class of questions stated in the statute we must receive the decision of the State Court as conclusive."

Even if this Court has the power and right to review the action of the State Court as to the non-Federal questions arising out of the aforesaid agreement, it is apparent that the State Court did not err in its ruling upon the objections interposed thereto by the plaintiff in error. Such objections were properly sustained under the laws of the State of California for these reasons:

The agreement being unrecorded and not executed by the parties litigant in this case but only by their grantees respectively of the Pioneer and Kennedy claims, is not valid as to the plaintiff in error who is a purchaser without notice of such agreement.

> Civil Code Cal., Secs. 1214, 1215, 1217.
> Calanchini v. Branstetter, 96 Cal., 612.

The unrecorded contract was made February 20th, 1871 (record page 15), the United States patent was issued for the Kennedy mine on July 29th, 1872 (record, page 16), in which patent no reference whatever is made to such agreement, and the plaintiff acquired such patented title on December 28th, 1886 (record, page 31), more than fifteen years after the issuance of the Kennedy patent. It would be extremely inequitable to read into the Kennedy patent this unrecorded agreement as against a purchaser without notice under the patent by mesne conveyance after such a lapse of time.

It is plain that such agreement could not in any wise affect the title of plaintiff in error to ores lying within the area of the Silva mine patented by the United States February 6th, 1893 (record, page 31), twenty-two years after such agreement was made by total strangers to such Silva title.

Plaintiff in error bases its ownership of the ores in question solely upon its ownership of and title to the Silva ground, and *quoad* the Silva at least, plaintiff in error is *neither party nor privy to the agreement made in 1871 by and between* the then owner of the Kennedy and Pioneer claims.

Whether we treat the alleged matter of estoppel as a covenant running with the land, or as a personal contract or obligation of the grantor of the plaintiff in error, like that in Middletown v.

Newport, 16 R. I., 319, cited 8 Am. and Eng. Ency. of Law (2d edition), p. 140, and consequently enforceable only against parties *affected with notice*, the result is the same.

That in California, the local law of which governs, the agreement cannot be dealt with as a strict covenant running with the land admits of no doubt, and with the absence of evidence of notice fully accounts for the ruling rejecting the evidence. Sections 1460 to 1464 of the Civil Code of California settle this.

Whenever and wherever the books speak of covenants, or estoppels as binding privies as well as parties, it is understood that as the obligation is the result of privity, it is limited to the extent of the privity. It exists only *quoad* the estate the purchase of which constitutes the privity, and affects not at all the purchaser so far as he claims and has other rights good in the hands of a third party, not privy and from whom he has also purchased. Such estoppels never bind strangers or those who claim by title paramount the deed. When the plaintiff in error purchased the Kennedy title it acquired it for itself and pledged no faith to maintain it, and with full "right to fortify that title by the purchase of any other," nor can any doctrine of estoppel bind it without notice.

Blight's Lessee v. Rochester, 7 Wheaton, 535, followed in Bybee v. Oregon, 139 U. S. 681, which sustains the proposition that so far as estoppel is concerned, the plaintiff in error was placed *in no worse position* by having accepted a deed from the old Kennedy Company, than if it had located the Silva, without acquiring the Kennedy title. The same follows from Osterhout v. Shoemaker, 3 Hill P. 518, and Sparrow v. Kingman, 1 Comstock, 256. *As grantee*, plaintiff in error, merely as such could not be estopped by acceptance of its deed; and could be so estopped in any view, *only where and to the extent that it is making its title under such deed, and asserting its claim solely* by reason of it.

Hunt v. Wright, 47 N. H. P. 401,

Even if there be notice, the estoppel binds only where and so long as the grantor's title "is the only one in question, and no estate has been derived from any other source."

2 Smith's Leading case, Sixth Am. Ed. (1866) P. 717.

McGee v. Stone is not at all to the contrary. It is entirely consistent with the two propositions that the grantee without

notice is not bound at all, and that a grantee with notice can only be estopped where and to the extent that his *only* claim is based upon the title granted and accepted. To that extent and to that extent only he stands in the shoes of his grantor. In McGee v. Stone, the *mutuality* of the estoppel was assumed. Here *quoad* the Silva there could be none, as shown by the authorities above cited. There not only was *notice* assumed, but further as an element of estoppel that all the parties *relied upon* and acted in view of the facts set up as matter of estoppel.

To summarize the matters here insisted upon, it is obvious that the State Court by its decision sustained the objections made by plaintiff in error, in effect dismissed from its consideration all matters contained in the agreed statement of facts relative to the compromise agreement,—completely eliminated that element from the case, and decided *its questions in favor of plaintiff in error;* and all subsequent proceedings in the case, affirmatively show that not only the State Court did not base its judgment upon the matters of such agreement, but on the contrary that the State Courts, both trial and appellate, solely based their judgment adversely to plaintiff in error upon the Federal questions involved.

Plaintiff in error respectfully insists that the cogency of these reasons, and the binding force of these principles, ought to impel this Court to grant a rehearing of this cause upon all the questions properly involved therein upon the writ of error heretofore granted.

Respectfully submitted,

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I hereby certify that in my judgment the foregoing petition for rehearing is well founded. It is not interposed for delay.

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